LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1969

No. 327

WALTER SHER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MARIO MATTHEW CUOMO
Counsel for Petitioner
32 Court Street
Brooklyn, New York 11201

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	3
Statement	4
Reasons for Granting the Writ	8
Conclusion	11
Appendix—Orders and Opinions Below	A-1

CITATIONS

Blackburn v. *U. S.*, 361 U.S. 199	11
Bruton v. *U. S.*, 391 U.S. 123	7, 9
Burgett v. *Texas*, 389 U.S. 109	9
Chapman v. *California*, 386 U.S. 18	7, 9
Fikes v. *Alabama*, 352 U.S. 191	11
Harrington v. *California*, U.S. (June 2, 1969)	9
Haynes v. *Washington*, 373 U.S. 503	11
Johnson v. *New Jersey*, 384 U.S. 719	10
Krulewitch v. *U. S.*, 336 U.S. 440	9
Miranda v. *Arizona*, 384 U.S. 436	10
Parker v. *Gladden*, 385 U.S. 363	6, 8, 10
People v. *McLucas*, 15 N.Y. 2d 167	7
People v. *Wood*, 12 N.Y. 2d 69	7
Remmer v. *U. S.*, 347 U.S. 227	8
Roberts v. *Russell*, 392 U.S. 293	9

IN THE

Supreme Court of the United States

October Term 1969

No. .....

WALTER SHER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari be granted to review the order of the New York State Court of Appeals entered in the above entitled capital case on April 17, 1969.

Citations to Opinions Below

The majority and dissenting opinions of the Court of Appeals, as yet unreported, are printed in the Appendix hereto at pages A1 *et seq.*

Jurisdiction

The order of the New York State Court of Appeals affirming a judgment of death was entered on April 17, 1969. No motion for a rehearing was made but petitioner's motion to amend the remittitur was granted on May 28, 1969 and the remittitur was thereafter amended to show

that the questions here presented were properly presented and necessarily passed upon in that Court. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Questions Presented

1. The main question presented is whether the failure to declare a mistrial because the jury had received and discussed numerous gravely prejudicial communications from an unknown party in the midst of the trial, constituted a violation of petitioner's rights under the Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, inasmuch as it denied him the right to an impartial jury and the right to confrontation and cross-examination.

2. Petitioner also seeks to preserve for argument, should certiorari be granted, the questions whether:

(1) the delay in arraignment as a matter of law;

(2) the trial court's ruling excluding a question as to whether a warning was given before the confession; and

(3) the trial court's failure to instruct the jury to consider petitioner's mental condition at the time of an alleged confession as bearing on the question of voluntariness; separately, or cumulatively, deprived petitioner of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement

Walter Sher, petitioner, was convicted of murder in the first degree and sentenced to death for acts arising out of an abortive jewelry store hold-up in New York. He had been indicted together with one Carbonaro, who had participated with him in the attempted hold-up. Because petitioner, who had a long history of mental illness (R. 563-712) was judicially declared not mentally capable of standing trial and committed to Matteawan State Hospital for the criminally insane (R. 1680-1743), Carbonaro was tried first. Carbonaro was convicted of felony murder (murder in the first degree) and sentenced to death (See 21 N.Y. 2d 271). Thereafter, petitioner was returned from Matteawan and made to stand trial.

Petitioner's principal defense was a claim of legal insanity. The evidence showed that seven different psychiatrists had made a total of nine separate diagnoses all to the effect that Sher was suffering from serious mental disease at the time of the alleged crime and for some time before. Two of the psychiatrists testified specifically that he was legally insane at the critical moment when the deceased was shot (R. 563-1007). It was also shown—without contradiction—that he was suffering from severe mental illness at the time certain alleged confessions were procured (R. 1709). Although three judges in the New York State Court of Appeals felt that Sher had "made out a strong case" on the question of insanity (A. 10) the unsigned opinion for the majority makes no specific mention of the evidence on this point (A. 1-4). The record indicates that the jury was troubled by the question (R. 1463).

A. The Jury Tampering

At the end of the People's case and before petitioner had an opportunity to present the evidence as to his insanity, it was brought to the trial court's attention that several of the jurors had separately received—and then discussed together—a number of unauthorized communications from an unknown party. There is some indication in the record that a bailiff took part in the discussions (R. 547), although it is clear that the ultimate source of the communications was an unidentified woman who had telephoned several of the jurors while they were at home for the evening in the midst of the trial (R. 538-560). In each of these conversations she had urged that the jurors convict Sher and sentence him to death. She remarked that Sher was a "vicious killer", "disregard the defendant's attorney", "vote for the electric chair", "Sher must be found guilty", "ignore the plea of insanity" and "disregard the testimony of defendant's psychiatrists" (id.).

It is conceded that this extra-judicial witness had told one of the jurors, a Mr. Nachbar, that Sher had a prior criminal record and that his co-felon Carbonaro had been found guilty and sentenced to death for the very crime for which Sher was then being tried (R. 548-550). This information as well as the subject of each of the other conversations, was communicated to all of the jurors—and, in fact, compared (R. 546)—during an en masse exchange of information and discussion that took place among them the morning after they received their calls (R. 540; 541; 543; 544; 547; 552; 553-556; 558).

When the trial court was apprised of the discussions among the jurors, (which had violated admonitions he had given them repeatedly throughout the trial (See e.g. R. 37; 44-45; 48; 441)), he called each of them in separately and

questioned them. The questioning was abbreviated and almost perfunctory (R. 539-560). It's principal purpose appeared to be to elicit from the jury their promise not to be influenced by the information they had received and not to again violate the Court's admonitions concerning discussions among themselves. He received these assurances and on the strength of them permitted the trial to resume (R. 562).

Petitioner's counsel raised the legal objection now being pressed by moving for a mistrial (R. 561).

Significantly, the prosecution conceded that the information imparted to Nachbar was indeed prejudicial but suggested that instead of the declaration of a mistrial, the juror Nachbar be excluded. Defense counsel took the position that even if the power to eliminate a single juror during the trial existed, it would not cleanse the jury of the contamination since the disclosures to Nachbar had been passed on to the other members of the jury (R. 560-561). The trial Court's denial of the motion for a mistrial also permitted Nachbar to remain (R. 561-562).

The jury eventually found the petitioner guilty and in a separate sentence hearing, condemned him to death (R. 1576).*

On the direct appeal to the State's Court of Appeals, petitioner's assigned counsel presented the jury tampering point as his main argument, relying in large part upon *Parker* v. *Gladden*, (385 U.S. 363). Several other arguments were also made, including those set forth in this petition as subordinate questions. The jury tampering issue was the only one commented upon by the Court. Four judges, in an unsigned opinion, concluded that no

* The sentences of both Carbonaro and petitioner have since been commuted to life imprisonment by the Governor.

constitutional rights had been deprived petitioner because the juror's assurances to the trial Court could be relied upon as sure evidence that the communications were in fact not prejudicial. The majority made no mention of *Chapman* v. *California,* (386 U.S. 18), *Bruton* v. *U.S.* (391 U.S. 123), nor any other of the Supreme Court cases in point. The three dissenting judges, relying upon *Parker* v. *Gladden,* and *Chapman* v. *California,* as well as several New York decisions, felt that petitioner's constitutional rights had been violated and a new trial should be ordered.

B. The Confessions

When the prosecution attempted to elicit testimony from a detective concerning alleged confessions by petitioner, defense counsel objected and a *voir dire* was undertaken (R. 414). In the course of it defense counsel asked whether petitioner had been advised anything he would say might be used against him (R. 468). An objection to the question was sustained and the Court expressly instructed the jury that "there is no such requirement" (R. 460). In his charge to the jury the Court specifically ordered them not to consider the excluded lack of warnings (R. 1454). Although he did charge that as a matter of law the delay in arraignment of 29 hours during which the confessions were elicited was illegal and should be considered (R. 1455), he failed even to mention that the evidence of petitioner's sub-normal mentality should also be weighed in making a determination as to voluntariness (R. 1394-1464). Assigned counsel did not raise these subordinate questons precisely in the trial Court but the law of the State of New York permitted petitioner to raise them for the first time on appeal since this was a death case (*People* v. *McLucas,* 15 N.Y. 2d 167; *People* v. *Wood,* 12 N.Y. 2d 69); and they were in fact presented to the Court of Appeals (See remittitur A. 17-18).

Reasons for Granting the Writ

1. As to the Jury Tampering Question

The decision of the New York Court of Appeals is in conflict with recent decisions of this Court. The majority held that the pollution of the jury in this case did not achieve constitutional dimensions. But it is clear from *Parker* v. *Gladden,* (385 U.S. 365) that the extra-judicial statements here, which were obviously designed to—and in fact tended to—influence the jury, deprived petitioner of his Sixth Amendment rights to an impartial jury, confrontation and cross-examination. It also seems plain that, given the prima facie violation of these constitutional rights, the majority ignored Supreme Court precedents through application of a standard of "harmfullness" at variance with this Court's recent decisions. Thus, the *Parker* case held that in situations of this sort the probability of prejudice is so great that the trial will necessarily be deemed lacking in due process (385 U.S. at p. 365; See also *Remmer* v. *U.S.,* 347 U.S. 227). The majority's one line attempt to distinguish *Parker* on the ground that a bailiff was involved there is inappropriate. To begin with, there is at least some evidence that a bailiff was also involved in this case (R. 547). More to the point, the situation in the case at hand was, on its face, more clearly productive of prejudice than that involved in *Parker,* which dealt with a single, relatively innocuous comment before three jurors to the effect that defendant "was a wicked fellow", and "was guilty". The comments in the case at hand, specifically those referring to petitioner's prior criminal record and the earlier conviction and death sentence of Carbonaro, were palpably more damaging. Additionally, the jury in this case not only received these communications but violated their oaths by disseminating, comparing and discussing them among themselves.

It should be kept in mind that the prosecution has conceded the prejudicial quality of the critical communications both in the trial court and the Court of Appeals. Indeed, the tack taken by the majority in disposing of petitioner's argument was never even suggested by the prosecution. Instead, it argued that the conceded prejudice could have been cured by eliminating the juror Nachbar, a position which the entire Court of Appeals rejected.

The prosecution's failure to argue that the apparent prejudice could be obviated by extracting assurances of objectivity from the jurors was understandable in view of this Court's decisions in *Chapman* v. *California,* (386 U.S. 18), *Burgett* v. *Texas,* (389 U.S. 109) and *Bruton* v. *U.S.*, (391 U.S. 123) (See also *Roberts* v. *Russell,* 392 U.S. 293); *Harrington* v. *California,* U.S. , #750, June 2, 1969). The *Chapman* and *Burgett* cases make it clear that where improper comments or evidence tending to influence the jury's verdict intrude upon the trial, the trial must be deemed constitutionally defective unless the prosecution shows, beyond a reasonable doubt, that the error was harmless. *Bruton* demonstrates that simple and glib assurances from the jury, like those in the case at hand, are not sufficient to meet that burden:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ." (Mr. Justice Brennan in *Bruton* v. *U.S.*, quoting Mr. Justice Jackson in *Krulewitch* v. *U.S.*, 336 U.S. 440, 453. *Bruton* v. *U.S.*, supra at p. 129, also authorities set forth in footnote 4 on that page; *Burgett* v. *Texas,* supra at p. 115).

The observation of Mr. Justice Jackson in *Krulewitch* applies even more dramatically in the case at hand since this jury had demonstrated the tentative and uncertain

quality of its assurances by ignoring the repeated admonitions of the trial Court.

In effect, the majority in this case replaced the constitutional rules propounded in the above mentioned Supreme Court decisions by what it took to be its own State rule. Thus, instead of adverting to and relying upon the appropriate Supreme Court decisions, the majority held that the possible harm arising from the apparent violation of petitioner's Sixth Amendment rights could be deemed cured under "the accepted precedents", which they then set out (A. 3). These "accepted precedents" (none of which are actually in point) are all New York decisions, antedating the Supreme Court decisions in the area.

The impact of the majority's error goes beyond its immediate effect in this case. The constitutional rights declared in *Parker* were declared there for the first time. The applicability of those rights to related situations remains to be described. If the decision of the New York Court of Appeals in this case is permitted to stand it will go a long way toward the curtailing of these constitutional prerogatives. The instances of jury tampering, regrettably, are not insignificantly infrequent. This opportunity should be taken, therefore, not only to correct a gross error in this murder case, but to clarify the rule for other similar situations in the future.

2. As to the Subordinate Questions

In the event the writ of certiorari is granted, petitioner will also argue that:

a) The trial Court's refusal to permit questioning concerning a lack of warning was contrary to this Court's precedents (*Miranda* v. *Arizona*, 384 U.S. 436; *Johnson* v. *New Jersey*, 384 U.S. 719);

b) The delay in arraignment, in conjunction with the other errors, required a new trial (*Haynes* v. *Washington*, 373 U.S. 503);

c) The trial court's failure to instruct the jury that evidence of petitioner's sub-normal mentality should be considered on the question of the voluntariness of the alleged confessions, was contrary to this Court's precedents (*Fikes* v. *Alabama*, 352 U.S. 191, 196; *Blackburn* v. *U.S.*, 361 U.S. 199; *Spano* v. *New York*, 360 U.S. 315).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

MARIO MATTHEW CUOMO
Counsel for Petitioner

July 10, 1969

Opinions of New York State Court of Appeals

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE &C.,

Respondent,

vs.

WALTER SHER,

Appellant.

PER CURIAM:

Walter Sher appeals from a judgment of conviction of two counts of murder in the first degree arising out of a jewelry store holdup on April 5, 1962. Sher was indicted along with a co-felon Dominick Carbonaro on April 13, 1962. Both men pled not guilty. The District Attorney contemplated bringing both Sher and Carbonaro to trial together. Before trial, however, Sher was committed to Matteawan State Hospital. A hearing was held before the County Court, Nassau County, which found that Sher was not sufficiently capable of understanding the charges pending against him to make a defense and confer intelligently with counsel. Carbonaro, therefore, stood trial alone. He was convicted of felony murder on October 4, 1963 and sentenced to death.

Sher was returned from Matteawan on July 23, 1963 to stand trial. His trial commenced on October 8, 1963, four days after Carbonaro had been found guilty. The jury returned a verdict of guilty on December 13, 1963.

A separate sentencing hearing was held before the same jury and a sentence of death was imposed.*

Both Sher and Carbonaro appealed their convictions directly to the Court. After the appeals were first docketed, a stipulation was entered into by counsel for both defendants and the District Attorney to remand the cases for confession hearings pursuant to *People* v. *Huntley,* (15 N.Y. 2d 72). [See *People* v. *Sher* and *Carbonaro,* 15 N.Y. 2d 798.] Both Sher's and Carbonaro's confessions were found to be voluntary. Before Sher's appeal was again on the calendar for argument, the Court affirmed the judgment of conviction of Dominick Carbonaro (*People* v. *Carbonaro,* 21 N.Y. 2d 271). The present appeal is before the Court pursuant to the original notice of appeal and the stipulation.

The proof of the substantive crime and the identity evidence in this appeal are substantially the same as that reviewed and affirmed in the separate appeal of Carbonaro. In the *Carbonaro* case the Court found that "the evidence establishing defendant's guilt was overwhelming" (*People* v. *Carbonaro, supra,* p. 275). That is the case again. Sher does not claim that the evidence of his guilt is insufficient Counsel in his brief candidly concludes that: "There is no question but that Walter Sher and Dominick Carbonaro were both involved in the perpetration of acts which, assuming a proper and fair trial and a finding of sanity, would justify a conviction."

The only incident during trial on which there is disagreement in the Court as to whether its occurence requires

* As to death sentences in pending cases, see press release of June 1, 1965 by Governor Rockefeller at the time of approval of L. 1965, ch. 1030, § 125.30 (repealed by L. 1967, ch. 791 § 10 enacting § 125.30 of the New Penal Law).

a new trial is the anonymous communications by telephone with several of the jurors following the close of the People's case and before submission of the defense. The incident resulted in no palpable prejudice to defendant since each of the jurors during the trial was questioned whether he could sit impartially and confine his verdict to the record evidence, and each answered in the affirmative, despite the telephone calls to Nachbor and others of the jury. This was after each related his own telephone conversations with the anonymous caller and with his fellow jurors. This cures the possible harm under the accepted precedents because the questioning of the jurors and admonition to them serves a real purpose in drawing their attention to the unfairness of their considering anything but the record evidence (e.g. *People* v. *Levy,* 15 N.Y. 2d 159, 166-167; *People* v. *Broady,* 5 N.Y. 2d 500, 514-516; *People* v. *Sorrentini,* 26 AD 2d 827; *People* v. *Jackson,* 20 AD 2d 918; *cf. People* v. *Hulett,* 22 N.Y. 2d 696, affg. 28 AD 2d 624; *People* v. *Lubin,* 190 App. Div. 339, affd. 229 N.Y. 601; see, generally, 41 C.J.S., New Trial § 51).

Significantly, the juror Nachbor, to whom the only really seriously unfavorable communications were made, stated:

> "A. If I may say so, Judge, this incident has done only one thing to me. It has strengthened my resolve to be completely impartial and to be governed by the evidence alone. There was no evidence given me at all yesterday, nothing whatsoever that could be called evidence. It was just somebody's urging to do a certain thing."

People v. *Cocco,* (305 N.Y. 282) involved an entirely different situation. There the improper communication came to defendant's attention after the verdict and there

was never an opportunity to "sterilize' the jury by appropriate examination and admonition. *Parker* v. *Gladden*, (385 U.S. 363) involved the vastly more serious situation of a court official, a bailiff, passing on the contaminating words (see, generally, Anno., Prejudicial Effect, in Criminal Case, of Communication Between Court Officials or Attendants and Jurors, 41 A.L.R. 2d 227). That is not to be compared with an anonymous or other irresponsible communication which a juror should easily understand is to be given no credence, if so advised and admonished.

Accordingly, the judgment of conviction should be affirmed.

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE &C.,

Respondent,

VS.

WALTER SHER,

Appellant.

KEATING, J. (dissenting):

Walter Sher was convicted of two counts of murder in the first degree and sentenced to death. If Sher had received a fair trial, the proof introduced by the People would amply justify his conviction. It is the pride, however, of American jurisprudence that the most cold-blooded

killer is entitled to the same essentials of a fair trial as the most upright pillar of society. Sher's trial was infected by a number of unauthorized telephone communications to jurors in the middle of the trial. We believe, because of the nature of these communications, that a great likelihood existed that the jury could not have reached its verdict solely on the evidence introduced at trial. These communications, therefore, deprived Sher of being convicted by an impartial jury, one of the fundamental requirements of due process.

The majority, in finding these communications harmless, fail to perceive that our task is to evaluate the possible prejudice to the defendant by the rule announced in *Chapman* v. *California* (386 U.S. 18), since the defendant was denied one of the basic mandates for a fair trial. In *Chapman*, the Supreme Court stated that "the beneficiary of a constitutional error . . . [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Id at 24). Applying this test to the instant case, we must find that a substantial likelihood existed that the jurors considered the unauthorized communications in arriving at their verdict.

The District Attorney completed the People's case on Wednesday, October 23, 1963. Defense counsel made a number of motions at this time. All were denied. The court then dismissed the jurors and asked them to return on Friday morning when the defense would start presenting its case. Before the jury was permitted to return home, the court admonished them that they were not to discuss the case among themselves or with anyone else. The judge also directed them not to read or listen to any acccounts of the trial in newspapers or on television. The jury was then permitted to go home. This admonishment had been

given numerous times before as required by section 415 of the Code of Criminal Procedure.

When the jury returned on Friday, it was brought to the court's attention that a number of unauthorized communications had taken place and that the jurors discussed these communications among themselves. In order to determine the extent of the problem the judge called each juror and alternate individually into his chambers, in the presence of counsel, and inquired if they received a communication, whether they had discussed it with other members of the jury, and asked the extent of their knowledge of other communications. The judge conducted the investigation. He asked each juror to describe briefly what occurred. Though counsel were both present they did not fully participate in questioning the jurors. (See *People* v. *Colascione,* 22 N.Y. 2d 65.)

It came to light that an unidentified female had telephoned a number of jurors on Thursday evening. She urged that the jury convict the defendant. She asked a few jurors to disregard the defense of insanity. She also remarked that Sher was a vicious killer, disregard the defendant's attorney, vote for the electric chair, Sher must be found guilty, ignore the plea of insanity and disregard the testimony of the defendant's psychiatrists. During one call she told juror Nachbor that Sher had a criminal record and that his co-felon Carbonaro had been found guilty and sentenced to death. The anonymous caller only reached five members of the jury. It was apparent, however, from questioning the jurors, that those jurors who had not received calls had, upon arrival at court, either held or overheard conversations detailing the substance of the calls. All the jurors, however, assured the judge that they would not be influenced by what had occurred and not

draw any inference from it. The jurors each promised the judge that they would only decide the case on the evidence introduced during the trial.

The defendant moved for a mistrial. The prosecution admitted that the comments made to juror Nachbor were prejudicial and suggested that Nachbor be withdrawn. Defense counsel did not concur in the District Attorney's appraisal of the situation and insisted on a mistrial. The judge denied the motion, and the trial was continued with the same panel.

The District Attorney argues that, with the exception of the comments made to Nachbor, the others discussed by the jurors were not prejudicial. The other comments the District Attorney analogizes to statements that could have been read in newspapers, heard on the radio or uttered by the District Attorney at trial. He stresses that, even if this information were known by a juror before trial, this would not furnish ground to challenge the juror for cause if, as was the case here, the juror stated he would not be influenced (Code Crim. Pro., § 376 [2]).

The District Attorney's argument is premised on the supposition that the prejudice to the defendant could have been purged by eliminating Nachbor, and since defense counsel refused to agree to his dismissal, the defendant waived his right to object to the composition of the jury.

The District Attorney's argument, we believe, is deficient in two respects. Though the statements that Sher was a vicious killer, that the psychiatrist should not be believed, give him the works, etc., might not be sufficient grounds for excusing a prospective juror if he had heard these comments before trial, it is clear, in this case, that

these comments were the impetus for extensive discussions among the jurors before the case was given to them. The subtle psychological effect of this information on the decision-making process cannot accurately be measured. The impact must have been substantial, however, because of the manner in which it was injected in the case and the subsequent en masse violation of the judge's instruction not to discuss the case among themselves.

Secondly, a reading of the record is bound to leave one in grave doubt whether the removal of Nachbor would purge from possible jury consideration the prejudicial statements made to him. It is not clear that the dismissal of any one juror could correct the possibility of a biased jury deliberation. The People cannot show that, under the circumstances, the defendant would not be substantially prejudiced even though Nachbor had been dismissed. The judge's examination of the jurors makes it obvious that all the jurors discussed the telephone calls. Though no other juror expressly testified that he knew of Nachbor's call, and Nachbor was not asked whether he told anyone else, we believe a substantial likelihood existed that all, or at least some of the jurors, were also infected with the knowledge that Nachbor carried in with him on Friday morning.

In *People* v. *Cocco,* (305 N.Y. 282) we reversed a conviction of second degree grand larceny because a prejudicial comment was made to *one* juror. Following the jury's verdict, the defendant moved to have the judgment of conviction set aside because of the unauthorized communication between a dismissed alternate juror and a woman juror made during a dinner break while the jury was deliberating. The alternate told the woman juror that he had heard that the defendant "runs a sporting house on

Western Avenue". The regular juror responded "I don't believe it" (*supra*, at p. 286). After the verdict was rendered, defense counsel learned of the conversation and asked for the verdict to be set aside. The judge conducted a hearing which developed that this was the only communication. It also appears that the jurors in *Cocco* did not discuss the information among themselves. We reserved and ordered a new trial. We stated:

> "Although Mrs. Ricker (the original juror) expressed to Huntsman (the alternate) her disbelief in the statement he had made to her and subsequently stated under oath that she had put out of her mind whatever he had said and that she had not mentioned to the jury or commented upon her conversation had with Huntsman, and although it appears from her affidavit that the statement made by him had no part whatever in the deliberations of the jury, we cannot say, in the circumstances disclosed by this record, that the furtive hearsay statement concededly made by Huntsman to a member of the jury, while that body was considering issues of fact submitted for its determination—including the defendant's character—did not prejudice defendant's substantial rights." (305 N.Y. 282, 287, *supra*.)

In *Parker* v. *Gladden*, (385 U.S. 363) the Supreme Court reversed a State Court conviction because a bailiff mentioned in the presence of three jurors: "Oh, that wicked fellow, he is guilty", and "if there is anything wrong the Supreme Court will correct it." The Supreme Court remarked, "[w]e believe that the unauthorized conduct of the baliff invokes such a probability that prejudice will result that it is deemed lacking in due process" (*supra*, at p. 365).

In *People* v. *DeLucia,* (20 N.Y. 2d 275, 280) we granted reargument in light of Parker. DeLucia was a case in which some of the jurors had made an unauthorized trip to the scene of the crime. We remarked: "In this type of case, proof of the fact of the unauthorized view is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their jury room deliberations. Such a visit in and of itself, constitutes inherent prejudice to the defendants."

We believe the case before us presents an infinitely more serious tampering with the jury than was present in the cases cited.

Notwithstanding the holdings in these cases, the prosecution raises the spectre of other mistrials in the future to dissuade us from reversing in this case. We do not see this case, if a reversal and new trial were ordered, however, as putting a wedge in the door by which either unscrupulous police officers, district attorneys or defense counsel can scuttle a criminal prosecution by simply making a telephone call. In this case, five jurors were contacted in the middle of trial. The jurors disobeyed the judge's instruction and failed to report the unauthorized communication to him. In addition, and more importantly, they extensively discussed the communications among themselves. Another relevant factor is that the calls were made before the defense called its first witness, belying the possibility that the defendant motivated the calls. Sher's principal defense was insanity, and he made out a strong case.

The troublesome problem of post-trial attack on a jury's verdict is not involved in this case. No chance exists that a reversal in this case will "encourage convicted felons to 'intimidate, beset and harass' * * * a discharged jury in an effort to establish possible grounds for a new trial" (*Parker*

v. *Gladden, supra,* at p. 369, dissenting opinion by Harlan, J.).

The majority in support of the proposition that mere questioning and admonishing a jury is sufficient to purge from its consideration obnoxious extra-judicial communications cite no case upon which reliance can fairly be placed. None of the cases referred to dealt with instances of jury tampering.

In light of the prior precedents in this court and in the Supreme Court, the defendant's conviction should be reversed and a new trial ordered.

* * * * * *

Judgment affirmed. Opinion Per Curiam. All concur except Keating, J., who dissents and votes to reverse in an opinion in which Fuld, Ch. J. and Burke, J., concur.

Order of the New York State Court of Appeals

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of April A.D. 1969.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

WALTER SHER,
Appellant.

The defendant herein, Walter Sher, having been heretofore and on the twenty-first day of November, 1963, convicted of the crime of Murder in the first degree at a trial had at a Criminal Term of the Supreme Court, held in and for the County of Nassau, and on the thirteenth day of December, 1963, sentence of death having been duly passed and imposed upon the said defendant by such Court, and the defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect;

NOW, THEREFORE, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that

the week beginning Monday, the second day of June, in the year of our Lord one thousand nine hundred and sixty-nine be and the same hereby is fixed as the week during which the original sentence of death shall be executed upon the defendant herein.

IN WITNESS WHEREOF, the Honorable Stanley H. Fuld, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed hereunto, this seventeenth day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

(Seal)

/s/ STANLEY H. FULD
Chief Judge

/s/ ADRIAN P. BURKE
/s/ JOHN F. SCILEPPI
/s/ FRANCIS BERGAN
/s/ KENNETH B. KEATING
/s/ CHARLES D. BREITEL
/s/ MATTHEW J. JASEN
Associate Judges

Attest:

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals

Original Remittitur of the New York State Court of Appeals.

No. 7
(1965)

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of April in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

Witness,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON, *Clerk.*

Remittitur April 17, 1969.

Sup Ct. No. 7.

THE PEOPLE &C.,
Respondent,

—VS.—

WALTER SHER,
Appellant.

BE IT REMEMBERED, That on the 7th day of January in the year of our Lord one thousand nine hundred and sixty-five, Walter Sher, the appellant in this action, came here unto the Court of Appeals, by Kenneth E. Vought, his

Original Remittitur of New York State Court of Appeals

attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction, as amended, of the Supreme Court, Nassau County.

And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William Cahn, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Mario Matthew Cuomo, of counsel for the appellant—, and by Mr. Henry J. DeVine, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of conviction, as amended, of the Supreme Court, Nassau County, appealed from in this action, be and is hereby in all things AFFIRMED.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Supreme Court.

THEREFORE, it is considered that the said original judgment of conviction, as amended, be and is hereby in all things AFFIRMED as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, Nassau

Original Remittitur of New York State Court of Appeals

County, before the Justices thereof, according to the form of the statute in such case made and provided.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 17, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

Amended Remittitur of the New York State Court of Appeals

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of May A.D. 1969.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. No. 657

THE PEOPLE &C.,

Respondent,

—VS.—

WALTER SHER,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: (1) Whether the failure to declare a mistrial deprived appellant of a

Amended Remittitur of the New York State Court of Appeals

right to a fair trial under the Sixth and Fourteenth Amendments of the Constitution of the United States; (2) Whether a delay in arraignment and a Trial Court ruling excluding a question as to whether a warning was given before the confession, deprived appellant of due process under the Fourteenth Amendment of the Constitution of the United States; (3) Whether the Trial Court's failure to instruct the jury in the absence of request or exception, that the defendant's mental condition at the time of the confession should be considered as bearing on voluntariness, deprived appellant of due process under the Fourteenth Amendment of the Constitution of the United States; (4) Whether section 145(2) of the Penal Law violated the appellant's privilege agaist self-incrimination under the Fifth and Fourteenth Amendments of the Constitution of the United States. The Court of Appeals held there was no violation of any of the defendant's constitutional rights.

AND the Supreme Court, County of Nassau, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)